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03
04 UNITED STATES DISTRICT COURT
05 WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

06 TIFFANY CORLISS,) CASE NO. C07-0541-RSL
07)
Plaintiff,)
08)
v.) REPORT AND RECOMMENDATION
09) RE: SOCIAL SECURITY
MICHAEL J. ASTRUE,) DISABILITY APPEAL
Commissioner of Social Security,)
10)
Defendant.)
11)

12 Plaintiff Tiffany Corliss proceeds through counsel in her appeal of a final decision of the
13 Commissioner of the Social Security Administration (Commissioner). The Commissioner denied
14 plaintiff's applications for Disability Insurance (DI) and Supplemental Security Income (SSI)
15 benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's
16 decision, the administrative record (AR), and all memoranda of record, it is recommended that this
17 matter be REMANDED for further administrative proceedings.

18 **FACTS AND PROCEDURAL HISTORY**

19 Plaintiff was born on XXXX, 1969.¹ She has a high school equivalency diploma (GED)
20

21 ¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the
22 General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the
official policy on privacy adopted by the Judicial Conference of the United States.

01 and previously worked as a telemarketer, dietary aide, and nursing assistant.

02 Plaintiff protectively filed her DI and SSI applications in March 2004. (AR 60-63, 175-
03 78.) With an amended disability onset date of January 9, 2004, plaintiff alleged disability due to
04 prior traumatic injury to her right foot, deafness in her right ear, visual limitation in her right eye,
05 and short term memory loss (AR 79). Her application was denied at the initial level and on
06 reconsideration, and she timely requested a hearing.

07 On February 9, 2006, an ALJ held a hearing, taking testimony from plaintiff and vocational
08 expert Susan Stewart. (AR 192-224.) On September 7, 2006, ALJ M.J. Adams issued a decision
09 finding plaintiff not disabled. (AR 14-18.)

10 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
11 March 5, 2007, making the ALJ's decision the final decision of the Commissioner. (AR 6-9.)
12 Plaintiff appealed this final decision of the Commissioner to this Court.

13 **JURISDICTION**

14 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

15 **DISCUSSION**

16 The Commissioner follows a five-step sequential evaluation process for determining
17 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
18 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not
19 engaged in substantial gainful activity since her alleged onset date. At step two, it must be
20 determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's
21 osteoarthritis status post crush injury to right foot, depression, and post-traumatic stress disorder
22 severe. The ALJ did not find plaintiff's hearing loss, poor memory, seizures, or poor right eye

01 vision severe. Step three asks whether a claimant's impairments meet or equal a listed impairment.
02 The ALJ found that plaintiff's impairments did not meet or equal the criteria for any listed
03 impairment.

04 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
05 residual functional capacity (RFC) and determine at step four whether the claimant has
06 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to lift ten
07 pounds occasionally with occasional standing and walking consistent with a full range of sedentary
08 exertional activity; able to perform unskilled to semi-skilled tasks; and able to respond
09 appropriately to supervision, co-workers, and usual work settings and able to deal with changes
10 in a routine work setting. The ALJ determined that plaintiff was able to perform her past relevant
11 work as a telemarketer. If a claimant demonstrates an inability to perform past relevant work, the
12 burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity
13 to make an adjustment to work that exists in significant levels in the national economy. Finding
14 plaintiff not disabled at step four, the ALJ did not proceed to step five.

15 This Court's review of the ALJ's decision is limited to whether the decision is in
16 accordance with the law and the findings supported by substantial evidence in the record as a
17 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
18 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
19 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750
20 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
21 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
22 2002).

01 Plaintiff argues that the ALJ erred in assessing the medical record, her testimony, and her
02 seizure disorder, and erred in determining her RFC and finding her capable of performing her past
03 relevant work. She requests remand for an award of benefits or, alternatively, for further
04 administrative proceedings. The Commissioner argues that the ALJ's decision is supported by
05 substantial evidence and should be affirmed. Plaintiff did not submit a reply.

06 Medical Evidence

07 A determination of disability requires consideration of the medical opinions in the record.
08 20 C.F.R. §§ 404.1527 and 416.927. *See also* Social Security Ruling (SSR) 96-5p ("The
09 adjudicator is required to evaluate all evidence in the case record that may have a bearing on the
10 determination or decision of disability, including opinions from medical sources about issues
11 reserved to the Commissioner.") In general, more weight should be given to the opinion of a
12 treating physician than to a non-treating physician, and more weight to the opinion of an
13 examining physician than to a non-examining physician. *Lester v. Chater*, 81 F.3d 821, 830 (9th
14 Cir. 1996). An ALJ may reject contradicted opinions of treating or examining physicians with
15 "clear and convincing reasons" and uncontradicted opinions with "specific and legitimate
16 reasons' supported by substantial evidence in the record for so doing." *Id.* at 830-31 (quoted
17 sources omitted). "The ALJ can meet this burden by setting out a detailed and thorough
18 summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and
19 making findings." *Magallanes*, 881 F.2d at 751 (quoting *Cotton v. Bowen*, 799 F.2d 1403, 1408
20 (9th Cir. 1986)). Also, the Commissioner must consider the opinions of state agency medical and
21 psychological consultants as opinions of nonexamining physicians and psychologists. SSR 96-6p
22 ("[While not bound by them, ALJs and the Appeals Council] may not ignore these opinions and

01 must explain the weight given to the opinions in their decisions.”)

02 “Where the Commissioner fails to provide adequate reasons for rejecting the opinion of
03 a treating or examining physician, [the Court credits] that opinion as ‘a matter of law.’” *Lester*,
04 81 F.3d at 834 (finding that, if doctors’ opinions and plaintiff’s testimony were credited as true,
05 plaintiff’s condition met a listing) (quoting *Hammock v. Bowen*, 879 F.2d 498, 502 (9th Cir.
06 1989)). Crediting an opinion as a matter of law is appropriate when, taking that opinion as true,
07 the evidence supports a finding of disability. *See, e.g., Schneider v. Commissioner of Social Sec.*
08 *Admin.*, 223 F.3d 968, 976 (9th Cir. 2000) (“When the lay evidence that the ALJ rejected is given
09 the effect required by the federal regulations, it becomes clear that the severity of [plaintiff’s]
10 functional limitations is sufficient to meet or equal [a listing.]”); *Smolen v. Chater*, 80 F.3d
11 1273,1292 (9th Cir. 1996) (ALJ’s reasoning for rejecting subjective symptom testimony,
12 physicians’ opinions, and lay testimony legally insufficient; finding record fully developed and
13 disability finding clearly required).

14 However, courts retain flexibility in applying this “‘crediting as true’ theory.” *Connett v.*
15 *Barnhart*, 340 F.3d 871, 876 (9th Cir. 2003) (remanding for further determinations where there
16 were insufficient findings as to whether plaintiff’s testimony should be credited as true). As stated
17 by one district court: “In some cases, automatic reversal would bestow a benefits windfall upon
18 an undeserving, able claimant.” *Barbato v. Commissioner of Soc. Sec. Admin.*, 923 F. Supp.
19 1273, 1278 (C.D. Cal. 1996) (remanding for further proceedings where the ALJ made a good faith
20 error, in that some of his stated reasons for rejecting a physician’s opinion were legally
21 insufficient).

22 Plaintiff notes that the ALJ in this case did not indicate the physicians’ opinions she relied

01 on in rendering her decision. She asserts error with respect to nonexamining State agency
02 physicians Drs. Paul Rethinger and Frank Lahman and examining physician Dr. Ryan Scott.

03 The ALJ indicated that she “considered opinion evidence in accordance with the
04 requirements of 20 CFR 404.1527 and 416.927 and SSRs 96-20, 96-5p and 96-6p[,]” but did not
05 describe her assessment of or assign any weight to the various opinions. (AR 17A.) She did,
06 however, discuss findings and opinions from Dr. Scott and examining physician Dr. Sam
07 Bartholomew. (AR 16-17A.) She did not mention Drs. Rethinger and Lahman.

08 A. Dr. Paul Rethinger and Dr. Frank Lahman

09 Plaintiff first notes that Drs. Rethinger and Lahman, on a Mental RFC Assessment
10 (MRFCA) form, found her moderately limited in her ability to understand, remember, and carry
11 out detailed instructions, to interact appropriately with the general public, and to set realistic goals
12 or make plans independently of others. (AR 149-50.) Plaintiff avers that the ALJ’s conclusion
13 that she could perform up to semi-skilled tasks is in contradiction to the assessed limitation
14 involving detailed instructions.

15 Plaintiff further notes that the semi-skilled telemarketer position identified at step four
16 requires a Specific Vocational Preparation (SVP) of 3, *see* Dictionary of Occupational Titles
17 (DOT) 299.357-014, which she maintains is inconsistent with her abilities as assessed by the State
18 agency physicians. Plaintiff argues that the ALJ relied on no medical authority in determining that
19 she could perform work as a telemarketer and, instead, stated that plaintiff “has admitted that she
20 has worked successfully as a telemarketer since her accident.” (AR 17A.) Plaintiff asserts error
21 in the ALJ’s rejection, without evaluation, of her testimony that she ceased such work due to
22 several seizures causing her to go to the hospital, low blood pressure which caused her to go down

01 a flight of stairs, and that she “couldn’t handle it.” (AR 201.)

02 Plaintiff next asserts that Drs. Rethinger and Lahman opined that she should not work with
03 the general public. (*See* AR 151.) She notes that the ALJ made no finding regarding her problems
04 with public interaction and, by omission, rejected the assessed limitation. Plaintiff asserts that the
05 position of telemarketer involves constant interaction with the public. *See* DOT 299.357-014
06 (“Solicits orders for merchandise or services over telephone: Calls prospective customers to
07 explain type of service or merchandise offered. Quotes prices and tries to persuade customer to
08 buy, using prepared sales talk.”)

09 Plaintiff maintains that the ALJ should have adopted the above-described limitations
10 assessed by Drs. Rethinger and Lahman. She argues that, given the failure to provide any reasons
11 to reject their assessments, the opinions of these physicians should be credited as a matter of law.

12 The Commissioner objects to plaintiff’s reliance on the MRFCAs form checkboxes,
13 “Section I”, and asserts that the ALJ’s RFC assessment is appropriately consistent with the
14 narrative portion of the form, “Section III”. *See* Program Operations Manual System (POMS) DI
15 25020.010 at B.1 (“The purpose of section I . . . on the [MRFCA] is chiefly to have a worksheet
16 to ensure that the psychiatrist or psychologist has considered each of these pertinent mental
17 activities and the claimant’s or beneficiary’s degree of limitation for sustaining these activities over
18 a normal workday and workweek on an ongoing, appropriate, and independent basis. It is the
19 narrative written by the psychiatrist or psychologist in section III . . . of [the MRFCAs] that
20 adjudicators are to use as the assessment of RFC.”) Drs. Rethinger and Lahman stated in the
21 narrative portion of the form:

22 Clt is capable of understanding, remembering & carrying out short & simple

01 instructions, is able to attend & concentrate for 2 hrs at a time, sustain ordinary
02 routines w/o special supervision, would work best in environments where she did not
03 have to interact w/the general public, is capable of interactions w/coworkers & could
use help in setting goals & making plans. Clt is not otherwise significantly limited.

04 (AR 151.) The Commissioner asserts that these findings are not inconsistent with the ALJ's RFC.

05 (*See* AR 17-17A.)

06 The Commissioner further argues that, in any event, there is no conflict between the
07 assessed moderate limitation in the ability to carry out detailed instructions and the ALJ's
08 determination that plaintiff can perform unskilled to semi-skilled tasks. *See* 20 CFR §§
09 404.1568(a), (b) and 416.968(a), (b) ("Unskilled work is work which needs little or no judgment
10 to do simple duties that can be learned on the job in a short period of time. . . . [A] person can
11 usually learn to do the job in 30 days, and little specific vocational preparation and judgment are
12 needed."; "Semi-skilled work is work which needs some skills but does not require doing the more
13 complex work duties.") He asserts that the ALJ's conclusion is consistent with both the State
14 agency physicians' opinions and plaintiff's work history. (*See* AR 151 (Drs. Rethinger and Latham
15 stated: "Clt's statement of inability to perform work activities due to her memory problems is
16 given partial credibility as testing has shown her to be able to learn & recall new info, [as well as]
17 ability to perform [activities of daily living] Clt has worked for sig periods of time earning
18 over SGA, i.e. per clt's rpt at CE, 2 yrs as car detailer, 10 mos as a waitress, & telemarketer on/off
19 for 2 yrs."))

20 The Commissioner also rejects the suggestion that the State agency physicians assessed
21 an absolute limitation on work with the general public, noting they assessed plaintiff as moderately
22 limited in the checkbox portion of the form and opined later they she "would work best in

01 environments where she did not have to interact w/the general public, is capable of interactions
02 w/coworkers[.]” (AR 151.) The Commissioner notes plaintiff’s report to Dr. Scott “that she got
03 along okay with supervisors, coworkers, and the general public[.]” and “that she can work ‘just
04 fine’ if,” *inter alia*, she was not in the presence of “a number of distracting factors such as working
05 in a restaurant, where there are ‘too many voices.’” (AR 137.) Plaintiff also reported to Dr. Scott
06 that she “was highly successful” in her telemarketing job prior to being fired for associating with
07 a whistleblower. (*Id.*) The Commissioner also avers, without any explanation, that a review of
08 the telemarketer job requirements reveals that while an ability to persuade is significant, “only a
09 markedly low aptitude or ability in dealing with people is required.” (Dkt. 15 at 17.)

10 The Commissioner maintains that the ALJ’s assessment was sufficient. He further avers
11 that, even if the Court found the analysis insufficient, any error was harmless to the ultimate
12 conclusion. He asserts that plaintiff offers no argument as to how any alleged error was harmful.

13 It seems entirely reasonable for the ALJ to have found plaintiff capable of performing her
14 past relevant work based on, among other things, her own admissions concerning that work. The
15 ALJ gave this as one of several reasons for finding plaintiff not entirely credible. (*See* AR 17A.)
16 As discussed below, plaintiff fails to demonstrate error in the ALJ’s credibility assessment. It
17 should also be noted that, in addition to the reasons outlined by plaintiff above, she also testified
18 that she left her telemarketing job because the company was “going under[.]” (AR 201.)²

19
20 ² Nor is plaintiff’s SVP argument persuasive. SVP levels are “defined as the amount of
21 lapsed time required by a typical worker” to become trained to perform adequately in a specific
22 position. DOT, App. C. An SVP of 1 requires only a short demonstration; an SVP of 2 requires
anything beyond a short demonstration up to a month; and an SVP of 3 requires over one month
up to and including three months. *Id.* “Using the skill level definitions in 20 CFR 404.1568 and
416.968, unskilled work corresponds to an SVP of 1-2; semi-skilled work corresponds to an SVP

01 However, it remains that the ALJ failed to even mention the opinions of Drs. Rethinger
02 and Lahman in the decision. As reflected above, SSR 96-6p specifically holds that an ALJ may
03 not ignore the opinions of state agency physicians and “must explain the weight given to the
04 opinions in their decisions.” The Commissioner correctly notes that the focus should be on the
05 narrative portion of their MRFCA form, rather than the checkbox findings. *See* POMS DI
06 25020.010 at B.1.³ Taking that narrative portion, it is questionable whether the ALJ’s RFC
07 assessment – finding her capable of performing unskilled to semi-skilled tasks, able to respond
08 appropriately to supervisors, co-workers, and usual work situations, and able to deal with changes
09 in a routine work setting (AR 17) – can be deemed wholly consistent with the opinions of the
10 State agency physicians, which included, *inter alia*, an assessed ability to understand, remember,
11 and carry out short and simple instructions, to concentrate for two hours at a time, and the opinion
12 that she “would work best in environments where she did not have to interact w/the general public
13 . . . & could use help in setting goals & making plans.” (AR 151.) “We require the ALJ to build
14 an accurate and logical bridge from the evidence to her conclusions so that we may afford the
15 claimant meaningful review of the SSA’s ultimate findings.” *Blakes v. Barnhart*, 331 F.3d 565,
16 569 (7th Cir. 2003). In this case, the ALJ failed to build such a bridge in relation to the opinions
17 of the State agency physicians.

18 The ALJ’s failure to discuss the findings of Drs. Rethinger and Lahman requires remand.

19 _____
20 of 3-4[.]” SSR 00-4p. In this case, given plaintiff’s past performance of telemarketing work, it
21 would not appear that the SVP of 3 poses any difficulty. *See, e.g.*, SSR 00-4p (“Skills are
22 acquired in PRW[.]”)

³ Although the POMS “does not have the force of law” it “is persuasive authority.” *Warre v. Commissioner of the Soc. Sec. Admin.*, 439 F.3d 1001, 1005 (9th Cir. 2006).

01 Because the evidence does not support an award of benefits, however, the opinions of these
02 physicians should not be credited as true. Nor is it clear that they could properly be credited as
03 true given their status as non-examining physicians. *See, e.g., Lester*, 81 F.3d at 834 (“Where the
04 Commissioner fails to provide adequate reasons for rejecting the opinion of a *treating or*
05 *examining physician*, [the Court credits] that opinion as ‘a matter of law.’”) (emphasis added).
06 Instead, the ALJ should be directed to consider and assess the opinions of Drs. Rethinger and
07 Lahman on remand. There are also two Physical RFC Assessment forms in the record from non-
08 examining physicians, neither of which are mentioned by the ALJ. (AR 143-48, 167-74.) She
09 should specifically address those forms on remand as well.

10 B. Dr. Ryan Scott

11 Plaintiff also asserts error in the consideration of the opinions of examining psychologist
12 Dr. Scott. She notes that Dr. Scott assessed a Global Assessment of Functioning (GAF) of 40 and
13 that the ALJ failed to evaluate that score. (AR 142.) “A GAF of forty indicates some impairment
14 in reality testing or communication, or major impairment in several areas such as work or school,
15 family relations, judgment, thinking, or mood.” *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 n.3 (9th
16 Cir. 2005) (cited source omitted). Plaintiff also notes that Dr. Scott “strongly recommended that
17 [plaintiff] go through a full neuropsychological evaluation to fully understand the extent of brain
18 damage, memory shortcomings, and any other neurological impairment.” (AR 142.) (*See also*
19 AR 140 (noting that it was inappropriate to use the Wechsler intelligence test as the sole
20 instrument to assess brain damage: “A full neuropsychological evaluation is critical to determine
21 the extent of . . . brain damage.”)) She maintains that the ALJ failed in his duty to fully and fairly
22 develop the record on this issue.

01 The Commissioner contends that the ALJ properly endorsed the opinion of Dr. Scott, who
02 observed that plaintiff was able to learn new information based on the results of mental status
03 testing. (*See* AR 17 A (“She has some significant differences between verbal and performance
04 scores on the WAIS-III, but Dr. Scott noted that she is able to learn new information and while
05 he indicated that she may do better at less complex work tasks, she has been quite successful
06 working in the past as a telemarketer by her own report.”)) He asserts that the ALJ’s findings were
07 consistent with Dr. Scott’s conclusions. (*See* AR 137-42.) The Commissioner distinguishes GAF
08 scores from disability findings (*see* Dkt. 15 at 9-10), and notes both plaintiff’s own comments to
09 Dr. Scott regarding her past successful employment and the conclusion of Dr. Rethinger that a
10 “GAF of 40 [is] not supported by testing, interview or [activities of daily living].” (AR 165.)

11 The Commissioner also disputes the need for further development of the record as to the
12 issue of brain damage. He avers that the ALJ correctly determined that the absence of medical
13 records as to brain damage supported a step two finding plaintiff had no such medically
14 determinable impairment. (*See* AR 17.) The Commissioner notes that the “ALJ’s duty to develop
15 the record further is triggered only when there is ambiguous evidence or when the record is
16 inadequate to allow for proper evaluation of the evidence.” *Mayes v. Massanari*, 276 F.3d 453,
17 459-60 (9th Cir. 2001). He maintains that, in this case, there was no such ambiguity given that
18 plaintiff’s alleged brain damage was uncorroborated by any competent medical evidence.

19 The ALJ did discuss some of Dr. Scott’s findings and, as asserted by the ALJ, appeared
20 to endorse at least the portion of Dr. Scott’s opinion as to plaintiff’s ability to take in new
21 information. (AR 16-17A.) However, the ALJ’s discussion was not sufficient. As noted by
22 plaintiff, the ALJ did not mention, *inter alia*, the assessed GAF score or Dr. Scott’s statements

01 regarding the need for neurological testing. While evidence in the record provided a basis for
02 rejecting the GAF score (*see* AR 151, 165), the ALJ did not rely on that evidence or even mention
03 the score. Also, while it is not clear that the ALJ need have further developed the issue of
04 neurological testing, he should have at least addressed the suggestion from this examining
05 physician.

06 The ALJ should be directed to consider and more thoroughly assess the opinions of Dr.
07 Scott on remand. Again, there is no basis for crediting the opinion of this physician as true.
08 Additionally, as with Drs. Rethinger, Lahman, and Scott, the ALJ should also specifically discuss
09 and assign weight to the opinions of examining physician Dr. Bartholomew. (AR 132-35.)

10 Credibility

11 Absent evidence of malingering, an ALJ must provide clear and convincing reasons to
12 reject a claimant's testimony. *See Vertigan v. Halter*, 260 F.3d 1044, 1049 (9th Cir. 2001). In
13 finding a social security claimant's testimony unreliable, an ALJ must render a credibility
14 determination with sufficiently specific findings, supported by substantial evidence. "General
15 findings are insufficient; rather, the ALJ must identify what testimony is not credible and what
16 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834. "In weighing a
17 claimant's credibility, the ALJ may consider his reputation for truthfulness, inconsistencies either
18 in his testimony or between his testimony and his conduct, his daily activities, his work record, and
19 testimony from physicians and third parties concerning the nature, severity, and effect of the
20 symptoms of which he complains." *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th Cir.
21 1997).

22 Here, the ALJ concluded that plaintiff's impairments could reasonably be expected to

01 produce the alleged symptoms, but that her statements as to the intensity, persistence, and limiting
02 effects of those symptoms was not entirely credible. The ALJ elaborated as follows:

03 While the claimant has alleged disability in part due to difficulty walking, she has
04 admitted that she is able to sit. She also continues to perform activities that require
05 some standing and walking such as grocery shopping and laundry. She does not
06 require any strong pain medication or other therapy for her orthopedic impairment.
07 She has some significant differences between verbal and performance scores on the
08 WAIS-III, but Dr. Scott noted that she is able to learn new information and while he
09 indicated that she may do better at less complex work tasks, she has been quite
10 successful working in the past as a telemarketer by her own report. There is no
11 evidence in the record that the claimant has sought treatment for depression or for
12 anxiety.

09 (AR 17A; internal citations to record omitted.)

10 As reflected above, plaintiff takes issue with the ALJ's assessment of her comments
11 regarding why she ceased her telemarketing work. (*See* AR 201.) However, it was not
12 inappropriate for the ALJ to rely on plaintiff's prior inconsistent comments to Dr. Scott (*see* AR
13 137) and the fact of her ability to maintain employment "with a fair amount of success[.]" *Drouin*
14 *v. Sullivan*, 966 F.2d 1255, 1258 (9th Cir. 1992). The ALJ also provided other clear and
15 convincing reasons for not finding plaintiff entirely credible, including her conservative and
16 inconsistent treatment. *See, e.g., Parra v. Astrue*, 481 F.3d 742, 750-51 (9th Cir. 2007) ("The
17 ALJ also noted that Parra's physical ailments were treated with an over-the-counter pain
18 medication. We have previously indicated that evidence of 'conservative treatment' is sufficient
19 to discount a claimant's testimony regarding severity of an impairment.") (quoting *Johnson v.*
20 *Shalala*, 60 F.3d 1428, 1434 (9th Cir. 1995)); *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir.
21 2005) ("That Burch's pain was 'not severe enough to motivate [her] to seek [these forms of]
22 treatment,' even if she sought some treatment, is powerful evidence regarding the extent to which

01 she was in pain.”) (quoting *Fair v. Bowen*, 885 F.2d 597, 604 (9th Cir. 1989)).

02 Plaintiff fails to demonstrate any error in the ALJ’s credibility assessment. However,
03 because the reassessment of the opinions of the physicians of record will likely impact the
04 credibility assessment, the ALJ should reconsider plaintiff’s credibility as needed on remand.

05 Seizure Disorder

06 The ALJ deemed plaintiff’s seizure disorder non-severe, stating: “The claimant has not
07 been under any treatment for a seizure disorder. While she was evaluated for complaints of a
08 possible seizure in July 2003 she admitted that she had not taken any medication for this concern
09 since 1992.” (AR 17.) The ALJ determined that this impairment, along with others deemed non-
10 severe, did not have more than a minimal impact on her ability to perform basic work functions.

11 Plaintiff asserts that the lack of treatment for her seizure disorder is irrelevant to the
12 determination of disability. She notes that the ALJ did not ask for an explanation as to why she
13 was not receiving care for this impairment “and failed to reconcile the lack of evaluation regarding
14 the seizure disorder.” (Dkt. 12 at 14.) She asserts that none of the State agency physicians
15 considered her seizure disorder and that the ALJ failed to obtain evidence to allow him to consider
16 how this impairment impacted her ability to work. Plaintiff points to her testimony regarding
17 seizures, including her assertions that she experiences residual fatigue after seizures and has
18 approximately one seizure per month. (AR 208.) She also avers that the ALJ erred in failing to
19 consider the combined impact of her impairments. 20 C.F.R. §§ 404.1523, 416.923 (“In
20 determining whether your physical or mental impairment or impairments are of a sufficient medical
21 severity that such impairment or impairments could be the basis of eligibility under the law, we will
22 consider the combined effect of all of your impairments without regard to whether any such

01 impairment, if considered separately, would be of sufficient severity.”⁴

02 At step two, a claimant must make a threshold showing that her medically determinable
03 impairments significantly limit her ability to perform basic work activities. *See Bowen v. Yuckert*,
04 482 U.S. 137, 145 (1987) and 20 C.F.R. §§ 404.1520(c), 416.920(c). “Basic work activities”
05 refers to “the abilities and aptitudes necessary to do most jobs.” 20 C.F.R. §§ 404.1521(b),
06 416.921(b). “An impairment or combination of impairments can be found ‘not severe’ only if the
07 evidence establishes a slight abnormality that has ‘no more than a minimal effect on an individual’s
08 ability to work.’” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996) (quoting SSR 85-28).
09 “[T]he step two inquiry is a de minimis screening device to dispose of groundless claims.” *Id.*
10 (citing *Bowen*, 482 U.S. at 153-54). An ALJ is also required to consider the “combined effect”
11 of an individual’s impairments in considering severity. *Id.*

12 Beyond the July 2003 document referenced by the ALJ, there is an absence of information
13 in the record regarding a seizure disorder. It should also be noted that plaintiff declined further
14 evaluation or treatment during that 2003 emergency room visit. (AR 127-28.) Also, plaintiff’s
15 own testimony on this issue is possibly contradictory. Although she stated that her seizures occur
16 once a month, she also described the “last one [she] had” as occurring during her employment with
17 West Coast Vinyl (AR 208), which would presumably correspond with her last employment – in
18
19
20

21 ⁴ Plaintiff also asserts that the ALJ “ignored the mandate set forth in footnote of [SSR] 96-
22 7p[.]” (Dkt. 12.) Although plaintiff may be referring to the third footnote in that SSR, she has not
described this argument with enough specificity to allow for either a response from the
Commissioner or an evaluation by this Court.

2003 or 2004 (*see* AR 68, 71).⁵ Although plaintiff puts the onus on the ALJ to have acquired more information regarding this condition, she bears the burden of making a threshold showing that this impairment significantly limits her ability to perform basic work activities. In this case, plaintiff failed to meet that burden. Nor does it appear that the ALJ failed to properly consider the combined impact of plaintiff's impairments. (*See* AR 17-17A.)

In sum, plaintiff fails to demonstrate any error with respect to her seizure disorder. However, should further evaluation of the record require further assessment at step two, the ALJ should reconsider this condition accordingly. In particular, an assessment of Dr. Scott's statements regarding neurological testing may impact this issue.

Other Issues

Given the above-described errors, plaintiff maintains error in the assessment of her RFC and ability to perform her past relevant work. Reassessment of the physicians' opinions may impact both the RFC assessment and determination at step four. Accordingly, the ALJ should reconsider these issues as needed on remand.

The Court also takes note of another possible error not identified by either party. The record contains a functional ability report completed by plaintiff's friend Scott York. (AR 103-111.) The ALJ does not mention this report.

Lay witness testimony as to a claimant's symptoms or how an impairment affects ability to work is competent evidence. *Van Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir. 1996). The ALJ can reject the testimony of lay witnesses only upon giving reasons germane to each witness.

⁵ This testimony is described as possibly contradictory given that plaintiff may have been describing the last seizure she had while at work. (*See* AR 207-08.)

01 *See Smolen*, 80 F.3d at 1288-89 (finding rejection of testimony of family members because, *inter*
02 *alia*, they were ““understandably advocates, and biased”” amounted to “wholesale dismissal of the
03 testimony of all the witnesses as a group and therefore [did] not qualify as a reason germane to
04 each individual who testified.”) (citing *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir. 1993)).
05 *Accord Lewis v. Apfel*, 236 F.3d 503, 511 (9th Cir. 2001) (“[L]ay testimony as to a claimant’s
06 symptoms is competent evidence that an ALJ must take into account, unless he or she expressly
07 determines to disregard such testimony and gives reasons germane to each witness for doing so.”)
08 Moreover, as recently found by the Ninth Circuit: “[W]here the ALJ’s error lies in a failure to
09 properly discuss competent lay testimony favorable to the claimant, a reviewing court cannot
10 consider the error harmless unless it can confidently conclude that no reasonable ALJ, when fully
11 crediting the testimony, could have reached a different disability determination.” *Stout v.*
12 *Commissioner, Soc. Sec. Admin.*, 454 F.3d 1050, 1056 (9th Cir. 2006).

13 Here, York’s report contains information regarding plaintiff’s symptoms and abilities. On
14 remand, the ALJ should assess the report and, if she rejects the testimony contained therein,
15 provide germane reasons for doing so.

16 CONCLUSION

17 For the reasons set forth above, this matter should be REMANDED for further
18 administrative proceedings.

19 DATED this 13th day of February, 2008.

20 

21 Mary Alice Theiler
22 United States Magistrate Judge